87-1741

NO._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

GERALD CORBELL, ET AL.,
Petitioners,

v.

KEVIN LEE STEVENS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

I. WHETHER QUALIFIED IMMUNITY UNDER *HARLOW V. FITZGERALD* BARS FURTHER LITIGATION AGAINST GOVERNMENT OFFICIALS WHO HAVE BEEN VINDICATED IN A TRIAL WITHOUT REVERSIBLE ERROR?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutions, Statutes and Rules

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Attorney General of Texas, on behalf of Gerald Corbell, Jesse Wilburn, and Hal Wyatt, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A., *infra*. la-15a) is reported at 832 F.2d 884 (5th Cir. 1987). The prior opinion of the court of appeals granting petitioners' motion for a stay of district court proceedings (App. *infra*. 16a-17a) is reported at 798 F.2d 120 (5th Cir. 1986). The initial opinion of the

district court granting respondent's motion for new trial (App. C., *infra*, 18a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered November 25, 1987. A petition for rehearing *en banc* was denied on January 22, 1988 (App. D., *infra*, 27a). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Title 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. Title 28 U.S.C. §2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

4. Section 39.02, Texas Penal Code, which provides, in pertinent part, as follows:

> (a) A public servant acting under color of his office or employment commits an offense if he:
>
> > (1) intentionally subjects another to mistreatment...that he knows is unlawful; or
> >
> > (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, ...or immunity, knowing his conduct is unlawful.
>
> (b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes

advantage of such actual or purported capacity.

STATEMENT OF THE CASE

Respondent filed suit under 42 U.S.C. §1983 against Petitioner Corbell for excessive use of force and against Petitioners Wilburn and Wyatt for failure to protect Respondent from Petitioner Corbell. The case was tried to a jury for four days. The jury rendered a verdict for Petitioners. Respondent filed a motion for a new trial, complaining that the intent requirements in the jury charge were erroneous. The district court granted Respondent's motion, concluding that jury instruction number 36 improperly instructed the jury that it was necessary for the Respondent to prove the subjective intent of the Petitioners (App., *infra*. 19a-27a). The instruction read:

> 36. Section 39.02 of the Texas Penal Code sets out the circumstances under which state officials transgress their authority under state law. The court finds this statute to comport with the Constitution of the United States. It provides, in part, as follows:
>
> > (a) A public servant acting under color of his office or employment commits an offense if he:
> >
> > > (1) intentionally subjects another to mistreatment ... that he knows is unlawful; or
> >
> > > (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, ...or immunity,

> knowing his conduct is unlawful.
>
> (b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(App. E. *infra*, 37a, 38a).

Petitioners submitted a motion to vacate the order granting a new trial or, in the alternative, to appeal pursuant to 28 U.S.C. §1292(b) and for a stay of district court proceedings pending the appeal. The district court denied this motion. Petitioners next filed in the district court a notice of appeal to the Fifth Circuit Court of Appeals, and filed in the Fifth Circuit an emergency motion for stay of the district court proceedings pending the appeal.

In applying for the stay, Petitioners argued that jury findings vindicating their actions on March 4, 1984, rendered them immune from further litigation under *Mitchell v. Forsyth*. 472 U.S. 511 (1985). A majority of the three-judge motion's panel agreed when it stayed district court proceedings: ". . .[I]f the jury findings stated are valid, these defendants are immune.," (App. B. at 17a).

After concluding that *Mitchell v. Forsyth* requires appellate scrutiny into the order granting a new trial, the panel explained how *Mitchell* applied in this case.

> This case has already once been tried, resulting in the stated jury finding, now set aside by the court on the ground that it gave the jury an incorrect legal instruction

> on intent. The defendants are entitled to appeal as of right from that action of the court, without being required to stand trial again before their appeal is terminated.

(App. B. at 17a).

After briefing and oral argument, the panel considering the merits of Petitioners, appeal ruled that appellate jurisdiction under *Mitchell* did not provide for plenary review of the district court's order:

> [S]ince our jurisdiction over this appeal is based on the collateral order doctrine, as made applicable by *Mitchell* to issues of law involving entitlement to qualified immunity, we will examine the district court's instructions for legal error only. (citation omitted). We do not consider it appropriate in this specialized kind of appeal to consider whether in the overall factual context of this particular case, any error in those instructions was sufficiently prejudicial to warrant a new trial.

(App. A. at 7a).

In affirming the district court's order, the court emphasized the narrow review being given:

> We conclude that the district court's instructions were legally erroneous. . . .Therefore, on the basis of our review of the instructions *for legal error only*, we affirm the district court's order granting Stevens a new trial.

(App. A. at 14a, 15a).

The two circuit panels reached conflicting decisions on how the petitioners' entitlement to qualified immunity applied. The panel granting the stay correctly focused on the fact that the petitioners spent four days in trial and were vindicated by a jury. Thus, the jury findings themselves render the petitioners immune from further litigation if the charge correctly set forth the law (App. B. at 17a). The panel deciding the merits of the appeal did not consider this in examining the qualified immunity issue:

> The police officers have argued, and the motion panel held, that the new trial order implicates the issue of their entitlement to qualified immunity (footnote omitted). We think, however, that the district court's basis for granting the new trial goes more to the substantive elements the plaintiff must prove in his section 1983 claims. None of the interrogatories submitted to the jury dealt with qualified immunity. Although one part of the court's jury charge did describe the qualified immunity defense, that instruction is not the basis upon the basis of which a new trial was granted.

(App. A. at 6a).

In the decision that we now seek to have reviewed, the court of appeals declined to review whether any reversible error occurred in the trial where government officials successfully defended their actions. The court of appeals specifically withheld appellate scrutiny of this breadth until *after* a second trial against the police officers. Thus, the court of appeals declined to consider whether any alleged deficiency in the jury instructions used in the vindication of the officials was harmless in light of the entire charge.

A petition for rehearing and suggestion for rehearing *en banc* was denied on January 22, 1988.

REASONS FOR GRANTING THE WRIT

This case presents important and unsettled questions concerning the substantive law of qualified immunity and conflicting courts of appeals, decisions construing the procedural accommodation of its principles.

1). The court of appeals held that plenary appellate scrutiny under *Mitchell v. Forsyth* does not extend to public officials who have successfully defended their actions in trial. The court of appeals ruled that in the context of government officials who have been vindicated in trial, no appellate review exists to consider whether any alleged defect in the proceedings is reversible until after the official has been subjected to another trial (App. A. at 14a). Implicit in the court of appeals' decision is the collateral order doctrine does not allow appellate courts to review whether alleged defects in trial proceedings concerning government officials constitute reversible error.

This failure to incorporate the harmless error doctrine into appeals brought pursuant to *Mitchell v. Forsyth* is inimical both to the doctrine of qualified immunity as well as to fundamental precepts of appellate review. First, the court of appeals' construction of the collateral order doctrine nullifies the harmless error doctrine under 28 U.S.C. §2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. (Emphasis added.)

The court of appeals' nullification of the harmless error doctrine is at odds with legions of cases where the doctrine has been applied to alleged defects in jury instructions. *See First Virginia Bankshares v. Benson*. 559 F.2d 1307 (5th Cir. 1977), *reh. denied*. 564 F.2d 416, *cert. denied*, *Walter E. Heller & Co. v. First Virginia Bankshares*, 435 U.S. 952 (1978) (For reviewing a trial court's instructions to a jury, court of appeals considers the challenged instruction as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the arguments of counsel, to determine whether the jury was misled and whether the jury understood the issues); *in accord*, *Houston v. Herring*, 562 F.2d 347 (5th Cir. 1977) (In reviewing trial court's instructions to jury, they must be considered as whole, and there is no harmful error if charge in general correctly instructs, even if one portion is technically incorrect, but erroneous instructions are not cured by correct instructions in other portions of charge when charge leaves reviewing court with substantial and ineradicable doubt whether jury has been properly guided in its deliberations).

Furthermore, failure to incorporate the harmless error doctrine into appellate review of orders which implicate government officials' qualified immunity ignores a central purpose of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court recognized the important public policy of protecting government officials from the costs of trial or the burdens of broad reaching discovery "where they have not violated a clearly established right." 457 U.S. at 817-818. This principle found procedural implementation in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), in which this Court extended appellate review to orders denying claims of qualified immunity. *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806 (1985).

Fundamental principles of qualified immunity require the court of appeal to review the entire jury charge before stripping a public official of a verdict rendered in his favor. The court of appeals misapplied *Mitchell* in reaching the conclusion that appellate jurisdiction extends to examine only whether any "legal error" exists in the charge. Such an abbreviated examination is functionally at odds with the weighty public policy concerns which underlie *Harlow* and *Mitchell.*

The court of appeals in this case was unwilling or unable to come to grips with the clearly established rules governing the collateral order doctrine. By reserving plenary examination of the charge until after the *second* trial, assuming a verdict against Petitioners is rendered, their immunity stemming from the verdict in their favor at the first trial would not be effectively reviewable after final judgment. By that time, the very purpose of immunity--to protect petitioners from the burdens of discovery and trial--would have been irrevocably sacrificed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**Counsel of Record*

CERTIFICATE OF SERVICE

I, Gabriel G. Quintanilla, Assistant Attorney General of Texas, do hereby certify that two true and correct printed and bound copies of the above and foregoing Petition for Writ of Certiorari have been served by placing the same in the United States Mail, postage prepaid, on this the _____ day of April, 1988, addressed as follows: Mr. Curtis B. Stuckey, P. 0. Box 1902, Nacogdoches, Texas 75963.

_____
GABRIEL G. QUINTANILLA
Assistant Attorney General

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APPENDIX

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APPENDIX A

Kevin Lee STEVENS Plaintiff-Appellee,
v.
Gerald CORBELL, et al.,
Defendants-Appellants.

No. 86-2609

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1987.

Appeal from the United States District Court for the Eastern District of Texas.

Before GARZA, WILLIAMS, and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

This appeal stems from section 1983 claims brought by plaintiff-appellee Kevin Lee Stevens against three police officers and a constable, in which Stevens alleged that the officers violated his constitutional rights by using excessive force in booking him into jail in Shelby County, Texas. Following an adverse jury verdict, the district court granted Stevens a new trial. Defendants-appellants Gerald Corbell, Hal Wyatt, and Jessie Wilburn (collectively, the police officers) brought this interlocutory appeal from the district court's new trial order on the ground that it deprived them of their right, under the doctrine of qualified immunity, not to go through a trial. We reject their arguments and, accordingly, affirm the district court's grant of a new trial.

Facts and Proceedings Below

Kevin Stevens spent the afternoon of March 4, 1984 drinking with some of his friends. At about 5:30 p.m., Stevens drove several friends to a nearby convenience store. In the parking lot of the convenience store, Stevens apparently hit a parked car owned by one of the girls riding with Stevens in his car. The girl whose car Stevens hit yelled at him, and Stevens threatened to strike her. An argument then ensued between Stevens and one of his male friends, and Stevens and the male friend began fighting in the parking lot.

Answering the convenience store manager's telephone call, Constable Johnny Williams arrived and arrested Stevens, who was twenty-one years old at the time, and two of his male friends. Williams handcuffed Stevens to one of the boys, and the other to himself. He ordered them into the police car and began driving to the Shelby County jail. En route, he radioed ahead for assistance, and was met at the jail by Officers Corbell, Wyatt, and Wilburn. As the young men entered the jail, they either tripped or were pushed, and fell to the ground.

What happened inside the jail is hotly disputed. According to Stevens, Officer Corbell slammed him against the wall. Corbell denies this. Stevens then punched Corbell in the face. Following this so-called "first incident," Stevens claims that he was unhandcuffed, taken into the kitchen area, and severely beaten by Corbell (the second incident). Stevens, allegedly unconscious by now, says Corbell subsequently dragged him into the intoxilizer room and beat him further (the third incident). Under Stevens' version of the facts, each of the other officers witnessed

at least one of these incidents, yet made no attempt to intervene on his behalf or otherwise to stop Corbell.

Corbell, on the other hand, claims that Stevens was violent and combative throughout the events in question, and that he used only the amount of force necessary to subdue Stevens. The other police officers concur that Corbell used a reasonable amount of force against Stevens.

Following these three incidents, Stevens was taken by ambulance to a hospital, where he remained for four days. His injuries included a broken eardrum, nose, and cheek bone, and several cut and bruises.

On April 9, 1984, Stevens filed suit against the police officers in their individual and official capacities, alleging a claim under 42 U.S.C. §1983 for deprivation of rights secured by the Eighth and Fourteenth Amendments to the United States Constitution, as well as a pendent state-law tort claim for assault and battery. The complaint averred that Officer Corbell used excessive force during each of the three incidents on March 4, 1984; that Officers Wyatt and Wilburn, and Constable Williams, acquiesced in and deliberately failed to prevent the "brutal beatings" by Officer Corbell; and that the actions and omissions of each of the defendants were "willful, wanton and reckless" and in "conscious disregard and reckless indifference to the constitutional ... rights" of Stevens. Stevens sought compensatory and punitive damages, and attorneys' fees. The officers answered by denying that they had deprived Stevens of any federal constitutional or state-law rights and by raising as an affirmative defense good faith immunity. Subsequently, following the death of defendant Williams, the district court dismissed Stevens' claims against him.

After a four-day trial that commenced on January 22, 1986, the district court instructed the jury, both orally and in writing, on Stevens' section 1983 claims and on the officers' defense of qualified immunity. The case was then submitted to the jury on special interrogatories, which asked with regard to each of the three incidents in questions whether Corbell had used "unreasonable force" against Stevens. The jury answered "No" to each of these interrogatories. In compliance with the conditioning instructions on the verdict form, the jury did not answer the remaining interrogatories, which addressed Stevens' claims against the other officers and the amount of damages. The district court entered judgment in accordance with the jury's verdict, dismissing Stevens' suit with prejudice.

Stevens then timely moved for a new trial, claiming error in the court's instructions to the jury. The district court granted Stevens' motion. The officers then submitted a motion to vacate the order granting a new trial or, in the alternative, to amend the order to allow for immediate appeal pursuant to 28 U.S.C. §1292(b) and for a stay of district court proceedings pending the appeal. The district court denied this motion. The officers next filed in the district court a notice of appeal to the Fifth Circuit, and filed in this Court an emergency motion for stay of the district court proceedings pending the appeal. *See* Fed.R.App.P. 4(a)(1), 8(a).

A motions panel of this Court granted the police officers' motion for stay pending appeal and, when Stevens subsequently moved for reconsideration of the order granting the stay, denied that motion.[1] The

[1]The panel opinion noted that one of the judges would have denied the officers' request for the stay and would have granted Stevens' motion for reconsideration.

motions panel reasoned that the police officers' appeal challenging the district court's decision to grant a new trial in effect raised the issue of their entitlement to qualified immunity; and that since the Supreme Court in *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), had held that a court's denial of a claim of qualified immunity was an appealable final decision within the meaning of 28 U.S.C. §1291, this Court had jurisdiction over the police officers' appeal. The appeal was then assigned to the present panel for a decision on its merits, following briefing and oral argument.

Discussion

Jurisdiction

(1) An order granting a new trial is interlocutory, and is therefore not ordinarily immediately appealable. *Allied Chem. Corp. v. Daiflon, Inc..,* 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980); *Dassinger v. South Central Bell Telephone Co.,* 537 F.2d 1345, 1346 (5th Cir. 1976). Under the collateral order doctrine, however, an otherwise interlocutory order of the district court is appealable as a final decision under 28 U.S.C. §1291 if it falls within "that small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949).

The Supreme Court in *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985), held that a denial of a summary judgment motion brought on the basis of a qualified immunity defense,

"to the extent that it turns on an issue of law," is an appealable final decision under the collateral order doctrine. According to *Mitchell,* immediate appealability was called for because the protection afforded by qualified immunity is not merely immunity from payment of damages, but also freedom from the burdens of standing trial and of undergoing unnecessary discovery in cases in which liability is foreclosed by the immunity doctrine as a matter of law. *Id.* at 2815-16 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 2737-38, 73 L.Ed.2d 396 (1982)). Since the entitlement includes immunity from suit in some cases, a court's wrongful denial of the defense could not in such cases be vindicated by appellate review after final judgment.

The police officers have argued, and the motions panel held, that the new trial order implicates the issue of their entitlement to qualified immunity.[2] We think, however, that the district court's basis for granting the new trial goes more to the substantive elements the plaintiff must prove in his section 1983 claim than to the issue of qualified immunity. None of the interrogatories submitted to the jury dealt with qualified immunity. Although one part of the court's jury charge did describe the qualified immunity defense, that instruction is not the one upon the basis of which a new trial was granted.

[2,3] Nevertheless, despite our doubt about whether the district court's order actually turned on the issue of qualified immunity, since the motions panel has already ruled not to dismiss the appeal, we

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[2]As mentioned above, the motions panel determined that the exception to the nonappealability rule for interlocutory orders created in *Mitchell* applied here. The panel therefore held that this Court had jurisdiction, pursuant to 28 U.S.C. §1291 and *Mitchell,* over the officers' appeal from the new trial order.

choose not to reconsider the panel's determination of our jurisdiction.[3] However, since our jurisdiction over this appeal is based on the collateral order doctrine, as made applicable by *Mitchell* to issues of law involving entitlement to qualified immunity, we will examine the district court's instructions for legal error only. *Cf. Schaper v. City of Huntsville*, 813 F.2d 709, 713 (5th Cir.1987). We do not consider it appropriate in this specialized kind of appeal to consider whether, in the overall factual context of this particular case, any error in those instructions was sufficiently prejudicial to warrant a new trial. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* §2803 (1973).

On the Merits

The district court premised its grant of a new trial on its conclusion that the jury could have been misled to Stevens' prejudice by its charge. The instruction about which Stevens complained, and which the district court concluded was erroneous, stated;

> "36. Section 39.02 of the Texas Penal Code sets out the circumstances under which state officials transgress their authority

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[3]We note, however, that a motions panel's provisional ruling on an issue of jurisdiction is normally not binding on the oral argument panel to whom the case falls for resolution of the appeal on the merits. *EEOC v. Neches Butane Prods.*, 704 F.2d 144, 147 & n. 2 (5th Cir.1983). *See also, e.g., EEOC v. Southern Pacific Transp. Co.*, 799 F.2d 1076, 1079 (5th Cir.1986); *Fischer v. United States Dept. of Justice*, 759 F.2d 461, 463 (5th Cir. 1985); United States Court of Appeals for the Fifth Circuit, *Court Policies*, No., 14(b) (1984). *But cf. DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1262-63 n. 2 (5th Cir.1983) (referring to general rule that holding in a prior appeal is law of the case).

> under state law .... It provides in part, as follows:
> "(a) A public servant acting under color of his office or employment commits an offense if he:
>
> "(1) intentionally subjects another to mistreatment ... that he *knows is unlawful;* or
>
> "(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, ... or immunity, *knowing his conduct is unlawful.*
>
> "(b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity." (Emphasis added.)

Significantly, the court further instructed that since this state law comported with the federal constitution, Stevens, to recover on his section 1983 claims, had to prove by a preponderance of the evidence that the officers had acted "beyond the limits of [their] authority under the state law."

According to the district court, the instruction wrongly required Stevens to prove that Corbell *intended* to subject him to mistreatment in order to prevail on the section 1983 claim. In the court's view, because the Supreme Court had recently reserved the question "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause," *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 1088, 89 L.Ed.2d 251 (1986) (quoting *Daniels v.*

Williams, 474 U.S. 327, 106 S.Ct. 662, 667 n. 3, 88 L.Ed.2d 662 (1986)), and because the Court had allowed recovery under a "deliberate indifference" standard in an Eighth Amendment, denial of medical treatment case, *see Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976), intentional infliction of harm was not the proper standard. The district court therefore concluded that its instruction, especially since it contained no definition of what constituted intent for these purposes, was sufficiently erroneous to warrant a new trial.

We concur that the instruction misstates the law, but we base our conclusion on a reason other than the one given by the district court. In determining whether injuries inflicted by police officers give rise to an actionable section 1983 claim, this Circuit follows the standard set forth in *Shillingford v. Holmes,* 634 F.2d 263, 265 (5th Cir. Unit A Jan. 1981). *Accord Lynch v. Cannatella,* 810 F.2d 1363 (5th Cir. 1987); *Hendrix v. Matlock,* 782 F.2d 1273, 1274 (5th Cir.1986); *Coon v. Ledbetter,* 780 F.2d 1158, 1163 (5th Cir.1986); *see also Williams v. Kelley,* 624 F.2d 695, 697 (5th Cir. 1980)(quoting a similar formulation from *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973)), *cert. denied,* 414 U.S. 1033, 101 S.Ct. 3009, 38 L.Ed.2d 324 (1981).[4]

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[4]In *Hendrix,* for example, we rejected the plaintiffs' challenge to a district court's instructions regarding their section 1983 and Fourteenth Amendment claim that the defendant police officers had used excessive force in attempting to arrest their son. The objected to instructions stated:

> "With respect to the excessive force theory, you are instructed that in order for the plaintiffs to (establish that the deputies ... crossed the constitutional lines that makes their shooting of Samuel Hendrix actionable under federal law, you must first find two things.

(footnote continued on next page)

As recently reiterated by this Court, *Shillingford* mandates that

> "[i]n determining whether the state officer has crossed the constitutional line that would make the physical abuse actionable under Section 1983, we must inquire into the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer. If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances, and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under Section 1983." *Coon,* 780 F.2d at 1163.

This standard is similar to the one stated last year by the Supreme Court in an Eighth Amendment excessive force case, where the Court stated that "whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore

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(footnote continued from previous page)
"First, that the deputies' actions were grossly disproportionate to the need for action under the circumstances, and second, that the deputies' actions were inspired by malice and not just a careless or unwise excess of zeal, so that their actions amounted to an abuse of official power that shocks the conscience." 782 F.2d at 1274.

We held that these instructions were a proper statement of the law, and therefore rejected plaintiffs' claims of error and affirmed the judgment for the defendants.

discipline or maliciously or sadistically for the very purpose of causing harm.'" *Whitley,* 106 S.Ct. at 1085 (quoting *Johnson,* 481 F.2d at 1033).

Whitley differs from the present case in that it involved a claimed infliction of cruel and unusual punishment in violation of the Eighth Amendment. Since that clause applies only after a person has been convicted of a crime, *id.* at 1084; *Thibodeaux v. Bordelon,* 740 F.2d 329, 333-34 (5th Cir. 1984), it cannot be the source of Stevens' constitutional rights. The *Whitley* standard therefore does not of its own force necessarily govern Stevens' claim, which is properly rooted in the due process clause of the Fourteenth Amendment. *See, e.g., Whitley,* 106 S.Ct. at 1088; *Shillingford,* 634 F.2d at 265.[5] However, the Supreme Court stated in *Whitley* that at least in the prison security context, the "Due Process Clause affords no greater protection than does the Cruel and Unusual Punishment Clause." *Id.* at 1088.

[4] Consequently, although the district court correctly observed that *Daniels* reserved the general question whether "something less than intentional conduct" may in some contexts trigger the protections of the due process clause, 106 S.Ct. at 667 n. 3, neither *Whitley* nor *Daniels* indicates that a lesser standard should govern in a case, such as this, where the plaintiff has claimed that excessive force was used in booking him while properly in jail pursuant to a lawful arrest. Moreover, the Supreme court has not yet affirmatively determined that anything less than

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[5]In some cases use of excessive force may also violate the Fourth Amendment guarantee of "the right of ... people to be secure in their persons," as made applicable to the states by the Fourteenth Amendment. *See e.g., Jamieson v. Shaw,* 772 F.2d 1205, 1210 (5th Cir.1985); *Shillingford,* 634 F.2d at 265.

essentially intentional or actually malicious conduct, which is basically what *Shillingford* requires, ever triggers Fourteenth Amendment substantive due process protections for purposes of a section 1983 action. We therefore disagree with the district court's suggestion that the Supreme Court's decisions in *Whitley* and *Daniels* changed this Circuit's standard for analyzing this kind of an excessive force, Fourteenth Amendment claim in a section 1983 action; neither the Supreme Court nor this Court has departed from the requirement that the constitutional line be drawn at action that was not only grossly disproportionate under the circumstances, but also was inspired by malice, so as to amount to an abuse of official power that shocks the conscience. *Hendrix,* 782 F.2d at 1275.

[5] We nonetheless agree that the district court's instructions contain an erroneous statement of the law governing Stevens' claim. Paragraph 36 of the instructions required Stevens to prove not only that Corbell intended to use excessive force, but also that he did so knowing that it was *unlawful* for him to do so. That is not the law. In order to be liable, Corbell must have realized that he was using more force than he honestly believed was actually needed to subdue and book Stevens. *See, e.g., Whitley,* 106 S.Ct. at 1085; *Shillingford,* 634 F.2d at 265. But he need not have known that using greater than necessary force was unlawful. A plaintiff claiming that use of excessive force violated his federal constitutional rights does not have to prove, as an element of his case in chief, that the state officer actually knew that his actions were in *violation of the law.* It was therefore error for the district court to give an instruction that in essence required Stevens to prove that Corbell used excessive force "knowing his conduct [wa]s unlawful."

[6] Furthermore, although in some cases a state official who did not know, and cannot reasonably be expected to have known, that his actions would violate the law may be entitled to the defense of qualified immunity, this is not such a case.[6] The defense of qualified, or "good faith," immunity shields a state official performing discretionary functions from liability in a section 1983 damages action when the officer's conduct, though perhaps later determined to have been illegal, does not violate a clearly established constitutional or statutory right of which a reasonable person would have then known. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 2815-16, 86 L.Ed.2d 411 (1985); *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In such cases the officer can gain immunity by showing that since the legal right in question was not clearly established at the time of his actions, he could not reasonably be expected to have known that his conduct was unlawful. *See Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *Lynch,* 810 F.2d at 1374.

[7] In this case, however, there is no real dispute about what the law authorized. The law is and was clear in allowing a police officer to use only the amount of force he honestly believes is needed. Since it is well-settled in this Circuit that knowing use of excessive force in booking an arrestee violates the arrestee's constitutional rights, the defense of qualified immunity is unavailable to a police officer who the plaintiff has alleged thus used excess force. *Coon,* 780 F.2d at

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[6]Of course, since qualified immunity is an affirmative defense, the plaintiff in a case such as this would not have the burden of proving, as a substantive element of a section 1983 claim of the present kind, that the defendant official knew or should have known of the unlawfulness of his conduct.

1164.[7] Qualified immunity therefore does not shield the officers from liability under the facts of this case, and, consequently, the district court's grant of a new trial cannot be overturned on the ground that is subjects the officers to a trial that the doctrine of qualified immunity entitles them not to have to face.[8]

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[7]The present case may be distinguished from those where, in order to establish the constitutional invasion itself, it is not necessary that the governmental actor have had any particular state of mind or one of more culpability than mere negligence. *See Coon,* 780 F.2d at 1164 n. 2. *See also Anderson v. Creighton,* 107 S.Ct. 3034 (1987); *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). This case may also be distinguishable from those in which some pr[illegible]isting statute (or other recognized expression of generally applicable law) purports to authorize the particular type of conduct complained of and the case turns on whether the statute (or other such rule) is unconstitutional in that respect. *Cf. Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

[8]Due to the conditioning language in the special interrogatories, which instructed the jury not to answer the interrogatories pertaining to Officers Wyatt or Wilburn unless it found against Corbell respecting at least one of the three incidents, the jury did not decide whether Wyatt or Wilburn had violated Stevens' constitutional rights. Hence, to the extent the error in the court's instructions affected the jury's answers to the interrogatories about Corbell's liability, it also caused the jury not to answer the remaining interrogatories. The propriety of the district court's decision to grant Stevens a new trial against defendants Wyatt and Wilburn therefore turns directly on the correctness of its decision to grant the new trial against Corbell. Except as to the legal question we have addressed in this appeal, the order granting a new trial against each of the officers thus requires a review of the facts, which must await a final decision following the second trial. Accordingly, we do not disturb the district court's grant of a new trial against Officers Wyatt and Wilburn.

Conclusion

We conclude that the district court's instructions were legally erroneous, and that its grant of a new trial to Stevens did not have the effect of depriving the police officers of a right, under the doctrine of qualified immunity, not to have to go through the burden of trial. Therefore, on the basis of our review of the instructions for legal error only, we affirm the district court's order granting Stevens a new trial.

AFFIRMED.

APPENDIX B

Kevin Lee STEVENS Plaintiff-Appellee,
v.
Gerald CORBELL,et al.,
Defendants-Appellants.

No. 86-2609

United States Court of Appeals,
Fifth Circuit.

Aug. 8, 1986.

Appeal from the United States District Court for the Eastern District of Texas.

Before THOMAS GIBBS GEE, THOMAS M. REAVLEY, and EDITH H. JONES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellants for stay pending appeal is GRANTED.

In this §1983 action against state police officers, a jury has found that the major alleged actor among them-the others are charged merely with failing to intervene- did not employ unreasonable force in subduing the plaintiff following his arrest. It is settled law that policemen are entitled to employ reasonable force in the performance of their duties; it is only the use by them of unreasonable force in the circumstances presented that violates federal rights. The Supreme Court holds that governmental officers performing discretionary actions in line of duty are immune from civil liability for their actions unless they violate

clearly established law. *E.g., Mitchell v. Forsyth,* 472 U.S. ___, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). It follows that, if the jury findings stated are valid, these defendants are immune.

Mitchell also determines that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. §1291 notwithstanding the absence of a final judgment." 472 U.S. at ___, 105 S.Ct. at 2817, 86 L.Ed.2d, at 427. Here the district court denied defendants' immunity on an issue of law: the scope of qualified immunity. As *Mitchell* recognizes, defendants' "entitlement is an *immunity from suit* ... effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at ___, 105 S.Ct. at 2816, 86 L.Ed.2 at 425.

This case has already once been tried, resulting in the state jury finding, now set aside by the court on the ground that it gave the jury an incorrect legal instruction on intent. The defendants are entitled to appeal as of right from that action of the court, without being required to stand trial again before their appeal is determined. The trial court's order granting new trial is therefore stayed until further order of this Court.

Judge REAVLEY would deny the stay on the grounds that the determination of qualified immunity rests on factual questions and, therefore, the appeal may not be maintained.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

KEVIN LEE STEVENS

V. CIVIL ACTION NO. L-84-77-CA

GERALD CORBELL, ET AL.

ORDER

The plaintiff, Kevin Lee Stevens, moves for a new trial, in accordance with FED.R.CIV.P. 59. Plaintiff filed suit under the terms of 42 U.S.C.§1983, seeking redress for the alleged use of excessive force by defendant Gerald Corbell, a trooper in the Texas Department of Public Safety. Plaintiff maintains that defendant Corbell used excessive force against him, when securing plaintiff's arrest on March 4, 1984, and that Troopers Hal Wyatt and Jessie Wilburn, also defendants herein, acquiesced in the use of such force, by failing to take actions to stop it. Following a four-day trial, the jury returned a verdict in favor of all of the defendants.

Plaintiff complains of six errors by the court during the trial. He argues that the court erred twice in instructing the jury; further, that defense counsel committed misconduct during the closing arguments. Plaintiff also alleges that, in the course of the trial, the court misapplied the rules of evidence on two occasions. Finally, plaintiff contends that the verdict is contrary to the weight of the evidence.

Defendants simply assert that the court correctly instructed the jury and abided by the rules of evidence. Moreover, defendants claim that any misconduct of defendants' counsel should not be considered, because plaintiff's counsel did not object to the purported misconduct during the final argument. Finally, they argue that the jury's verdict comports with the evidence.

Plaintiff's allegations must be analyzed in accordance with FED.R.CIV.P. 59 and 61. Rule 59 states: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States...." The rule allows a trial judge to grant a new trial, when "it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." 11 Wright & Miller, *Federal Practice and Procedure,* § 2803 (1973). Rule 61 specifies that no error "is grounds for granting a new trial or for setting aside a verdict ... unless refusal to take such action appears to the court inconsistent with substantial justice." Moreover, by this rule, the court should "disregard an error or defect in the proceeding which does not affect the substantial rights of the parties." The critical consideration, therefore, is "the seriousness of the error, not its occurrence." 11 Wright & Miller,§ 2883.

If a judge "is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand...." *Kotteakos v. United States,* 328 U.S. 750 (1946).[1] However, if it cannot be

[1]Although *Kotteakos* evaluated a 1919 statute that first adopted the harmless error standard for federal courts, "it is plain that he [Justice Rutledge, who wrote the opinion] considered this to be the same in substance as Civil Rule 61." 11 Wright & Miller, §2883.

said "with fair assurance ... that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Ibid.* In determining the effect of an error, "[o]ne must judge other's reactions not by his own, but with the allowance for how others might react." *Id.* at 764. Further, any error should be analyzed "in relation to all else that happened." *Ibid.*

Plaintiff maintains that jury instruction number 36 improperly instructed the jury that it was necessary for the plaintiff to prove subjective intent on the part of the defendants. The instruction read:

> 36. Section 39.02 of the Texas Penal Code sets out the circumstances under which state officials transgress their authority under state law. The court finds this statute to comport with the Constitution of the United States. It provides, in part, as follows:
>
> > (a) A public servant acting under color of his office or employment commits an offense if he:
> >
> > > (1) *intentionally* subjects another to mistreatment ... that he knows is unlawful; or
> > >
> > > (2) *intentionally* denies or impedes another in the exercise of enjoyment of any right, privilege, ... or immunity, knowing his conduct is unlawful.

> (b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(Jury Instructions, L-84-77-CA, p. 10) (emphasis added). Plaintiff alleges that this instruction "gave the jury the incorrect impression that plaintiff must prove that defendants intended to act in a manner they knew to violate plaintiff's constitutional rights." Memorandum of Law in Support of Plaintiff's Motion for New Trial, L-84-77-CA, p. 4.

Plaintiff objected to instruction number 36, during an in-chambers conference on January 27, 1986, specifically, to the language "intentionally" in the Penal Code. Plaintiff's counsel argued, "[P]laintiff is not required to show that the defendants' misconduct was intentional." Tr. at 751. Counsel also requested that plaintiff's tendered instructions 28, 29, 30, and 31 be given, in lieu of the court's instruction 36.[2] (The court's

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[2]Plaintiff's proposed instructions, which were not adopted by the court, stated:

> Jury Instruction No. 28. Plaintiff Kevin Stevens must demonstrate by a preponderance of the evidence that the defendant or defendants wrongful acts, if any were done with deliberate indifference or callous disregard to plaintiff's rights in order to prevail on his 42 U.S.C. §1983 claims. Mere negligence on the part of any defendant is not sufficient to entitle plaintiff to a judgment on his claims for which redress is sought by 42 U.S.C.§1983. On the other hand, act or acts of any defendant need not be intentional in order for plaintiff to prevail.

Stokes v. Delcambre, 710 F.2d 1120 (5th Cir. 1983), was cited as the basis for the proposed instruction.

(footnote continued on next page)

refusal to tender plaintiff's proposed instructions is plaintiff's second ground of error with regard to the jury instructions.) To support his position, plaintiff's counsel cited *Stokes v. Delcambre,* 710 F.2d 1120 (5th Cir. 1983). Tr. at 753-54. The court questioned the relevance of the case and overruled plaintiff's objection, since *Stokes*, a case involving Eighth Amendment

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(footnote continued from previous page)

> Jury Instruction No. 29. It is not necessary for Kevin Stevens to prove that any defendant had the specific intent to deprive him of his constitutional rights in order to prevail.

As authority for such proposed instruction, *Ingraham v. Wright,* 498 F.2d 248 (5th Cir. 1974), affirmed at 92 S.Ct. 1401, was cited.

> Jury Instruction No. 30. A law enforcement official is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the person affected, or if he took the action with the malicious intention to cause the deprivation of constitutional rights or other injury to the person.

Wood v. Strickland, 420 U.S. 308, 322 (1975), was cited as authorizing this proposed instruction.

> Jury Instruction No. 31. It is no defense to any defendant that he may have been acting in the sincere subjective belief that what he was doing is right. Ignorance of settled law is no defense.

Jackson v. State of Mississippi, 644 F.2.d 1142 (5th Cir. 1981)(sic); *Douthit v. Jones*, 619 F.2d 527 (5th Cir. 1980), were cited as authority for such proposed instruction.

transgressions, does not control an action for violation of a plaintiff's Fourteenth Amendment right to liberty.[3]

It must be determined, then, whether it is requisite that plaintiff aver a defendant's conduct was *intentional*, in order to state a §1983 claim for denial of liberty, and thus a violation of the due process clause. The Supreme Court has "recently reserved the general question 'whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause.'" *Whitley v. Albers*, 54 U.S.L.W. 4236, 4241 (March 4, 1986) (quoting *Daniels v. Williams*, ___U.S.___, 106 S.Ct. 662, 667 n.3 (1986)). *Daniels* held that, to state a §1983 claim for a denial of liberty, a plaintiff must prove more than negligence, but is not required to show intentional conduct, on the part of a defendant. The case identified the "spectrum" of "elusive terms" to include negligence, recklessness, gross negligence, and intent. *Daniels*, 106 S.Ct. at 667.

Although it is not controlling in an action based on the Fourtenth (sic) Amendment, Eighth Amendment doctrine in §1983 actions holds that "[a]n express intent to inflict unnecessary pain is *not* required" to state a claim. *Whitley*, 54 U.S.L.W. at 4238 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (emphasis added)). "[D]eliberate indifference" is sufficient to state

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[3]The Eighth Amendment applies to those convicted of crimes, whereas a person who is not in prison has a liberty interest in the integrity of his body, as guaranteed by the Fourteenth Amendment. "The cruel and unusual clause [of the Eighth Amendment] 'was designed to protect those *convicted* of crimes,' ... and consequently the clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" *Whitley v. Albers*, 54 U.S.L.W. 4236, 4238 (March 4, 1986) (citations omitted) (emphasis added).

an Eighth Amendment violation, *Estelle*, 429 U.S. 97, which can be manifested by "conscious or callous indifference to [a prisoner's] needs," *Fielder v. Bossard*, 590 F.2d 105, 107 (5th Cir. 1979), "facts clearly evincing 'wanton' actions on the part of the defendants," *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985), or "actual intent or reckless disregard." *Benson v. Cady*, 761 F.2d 335, 339 (7th Cir. 1985).[4]

Cases discussing punitive damages in § 1983 actions also hold that intentional conduct is not required. *See Smith v. Wade*, ___U.S.___, 103 S.Ct. 1625 (1983). In *Smith v. Wade*, the Supreme Court specifically rejected an argument that actual intent is the proper standard for punitive damages. There, the Court found "that reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages" in a §1983 action. *Id.* at 1637. *See also Stokes*, 710 F.2d 1120.

These Eighth Amendment and punitive damage holdings suggest that a standard of intentional conduct is too stringent in a §1983 action for violation of the constitutional right to liberty. If a prisoner can prove cruel and unusual punishment based on the "deliberate indifference" of a defendant, it appears that no more should be required to state a Fourteenth Amendment claim. Further, if a defendant can be assessed punitive damages for reckless conduct, as in *Smith v. Wade*,

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[4]"Gross recklessness is not enough" in an Eighth Amendment action in the Seventh Circuit. *See Duckworth v. Frunzen*, 780 F.2d 645, 653 (7th Cir. 1985), where it was held that "the inflicting of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense." *Id.* at 652-53.

then that standard seems sufficient, insofar as the liability phase of an action is concerned. In sum, it is manifest that §39.02 of the Texas Penal Code, which uses the word "*intentionally*," should not have been used in the jury instructions, because the plaintiffs were not required to prove intentional conduct.

Even were a party required to prove that the defendants' conduct was intentional in order to state a §1983 claim for denial of liberty, another error permeates the instructions. No definition of intentional conduct was given, and the jury was left to determine its own construction of the word *intentionally*. Under the Texas Penal Code, a person's conduct is intentional "when it is his conscious objective or desire to engage in the conduct or cause the result." Texas Penal Code §6.03(a) (Vernon 1974). The commentary to this statute explains that the word *intentional* "is synonymous with purposeful: one purposefully engages in conduct -- shoots a pistol, *throws a punch*, or a bomb ... --*or* one desires a particular result death, serious bodily injury...." Commentary, Texas Penal Code §6.03(a)(emphasis added).

Without an instruction defining *intentional*, the jury could have focused on the more stringent meaning of intent, that is: a desire to cause the result. Thus, they could have decided that defendant Corbell did not purposely injure Stevens, in that he did not intent (sic) to cause severe harm. (In fact, Corbell's attorney expressed regret that Stevens had been injured.) However, if, the jury had been asked whether Corbell purposefully engaged in the conduct -- *i.e.*, whether he meant to strike Stevens -- a different result might have been reached. Consequently, even if the court did not err in requiring proof of intentional conduct, it was error not to instruct the jury regarding the proper definition of the work *(sic) intentional*.

Nowhere else in the instructions were standards of intent described. Moreover, the jury was not informed of such criteria as deliberate indifference, recklessness, or gross negligence. It is apparent, then, that the jury could have been mislead, believing it was necessary that Corbell had the intent to injury (sic) Stevens. When instructions considered as a whole tend to mislead a jury, a new trial should be granted. *See Aero International, Inc. v. United States Fire Insurance Co.*, 713 F.2d 1106, 1113 (5th Cir. 1983). These instructions suffer from a serious and prejudicial flaw, requiring that a new trial must be granted.[5] Accordingly, it is

ORDERED that plaintiff's motion for a new trial shall be, and it is hereby, GRANTED.

SIGNED and ENTERED this 30th day of May, 1986.

/s/

CHIEF JUSTICE

[5]Because the error in the jury instructions requires that a new trial will be granted, plaintiff's other contentions will not be considered.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-2609

KEVIN LEE STEVENS,
Plaintiff-Appellee,

versus

GERALD CORBELL, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 11-25, 5 Cir., 1987, __F.2d__)
(January 22, 1988)

Before GARZA, WILLIAMS and GARWOOD. Circuit Judges.

PER CURIAM:

(✔) Treating the suggestions for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active

of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

REHG-8

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

KEVIN LEE STEVENS,

Plaintiff,

V. **CIVIL ACTION NO. L-84-77-CA**

GERALD CORBELL,
HAL WYATT, and
JESSIE WILBURN,
Defendants.

INSTRUCTIONS OF THE COURT TO THE JURY

MEMBERS OF THE JURY:

1. Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the court as to the law applicable to this case.

2. It is your duty as jurors to follow the law as stated in the instructions of the court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

3. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

4. Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law

ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

5. Justice through trial by jury must always depend upon the willingness of each individual juror to find the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

6. You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Kevin Lee Stevens, and the answer thereto of the defendants, Gerald Corbell, Hal Wyatt, and Jessie Wilburn. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

7. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. The law is no respector of persons; all persons, including law enforcement officers, stand equal before the law, and are to be dealt with as equals in a court of justice.

8. As to each claim asserted by the plaintiff in a civil action, such as this, the burden is on the plaintiff to prove every essential element of his claims by a

preponderance of the evidence. If the proof should fail to establish any essential element of any of plaintiff's claims by a preponderance of the evidence in the case, the jury should find for the defendants as to such claim.

9. To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has the more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

10. In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

11. Anything you may have seen or heard outside the courtroom touching the merits of the case is not evidence, and must be entirely disregarded.

12. You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

13. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

Ordinarily, it is assumed that a witness will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by the evidence to the contrary of the testimony given.

14. You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

15. Inconsistencies or discrepancies in the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing the same incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

16. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a large number of witnesses to the contrary.

17. A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that some other time the witness had said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

18. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

19. After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

20. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

21. You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely.

22. During the trial of this case, certain testimony has been read to you by way of deposition.

The testimony of a witness who, for some reason, cannot be present to testify from the witness stand is usually presented in writing under oath, in the form of a deposition. Such testimony is entitled to the same consideration and, insofar as possible, is to be judged as to credibility, and weighed, and otherwise considered, by the jury in the same way as if the witness had been present, and had given from the witness stand the testimony read to you from the deposition.

23. It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible.

24. Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

25. When the court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely and may draw no inference from the wording of it, or speculate as what the witness would have said if permitted to answer any question.

26. Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as conclusively proved.

27. There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence--the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

28. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

29. The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

30. During the course of the trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related. Remember at all times that you, as jurors are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

31. The plaintiff in this case, Kevin Lee Stevens, claims damages, alleged to have been suffered and sustained by him, as a result of the deprivation by defendants, under color of state law, of rights, privileges, and immunities secured to him, both by the constitution (sic) of the United States and by an act of Congress. Specifically, the plaintiff alleges that the defendants, Gerald Corbell, Hal Wyatt, and Jessie

Wilburn, were State Troopers, employed by the Department of Public Safety of the State of Texas, and that while acting as State Troopers, under color of law of the State of Texas, they knowingly subjected him to the deprivation of his liberty without due process of law. In particular, plaintiff alleges that he was deprived of his right not to be subjected to excessive and unreasonable force and mistreatment by defendant Gerald Corbell, in connection with the maintenance of his custody; and that defendants Jessie Wilburn and Hal Wyatt failed to intervene to protect him, although they were aware that plaintiff was being subjected to unreasonable force by defendant Gerald Corbell.

32. Under the provisions of §1983 of Title 42 of the United States Code, any inhabitant of this federal judicial district may seek redress in this court, by way of damages, against any person or persons who, under color of any law, statute, ordinance, regulation, or custom, knowingly subjects such inhabitant to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

33. The statute just outlined to you comprises one of the Civil Rights Acts enacted by the Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor deny to any person within its jurisdiction equal protection of the laws.

34. The Fourteenth Amendment also provides that no state shall deprive any person of his liberty without due process of law. The Supreme Court of the United States has held that due process of law includes

the Eighth Amendment's prohibition of cruel and unusual punishment; hence, state officials may not constitutionally administer such punishments. The plaintiff in this case, Kevin Lee Stevens, then, in common with the defendants, Gerald Corbell, Hal Wyatt, and Jessie Wilburn, and all other persons living under the protection of our Constitution, has the legal right at all times not to be deprived, without due process of law, of any liberty secured or protected to him by the Constitution and laws of the United States. In particular, an individual has the right not to be subjected to serious injury by peace officers, without due process of law.

35. The liberty of the individual which the federal constitution secures and protects is not an absolute unqualified freedom or privilege to do as one pleases at all times and under all circumstances, but it is always subject to reasonable restraints, including, of course, such reasonable restraints as are imposed by state law. Hence, to be deprived of liberty without due process of law, under the circumstances of this case, means to be deprived of liberty without authority of a valid state law.

36. Section 39.02 of the Texas Penal Code sets out the circumstances under which state officials transgress their authority under state law. The court finds this statute to comport with the Constitution of the United States. It provides, in part, as follows:

> (a) A public servant acting under color of his office or employment commits an offense if he:
>
> > (1) intentionally subjects another to mistreatment...that he knows is unlawful; or

> (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege,...or immunity, knowing his conduct is unlawful.
>
> (b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

37. Under the provisions of Section 1.07 of the Texas Penal Code, "'[u]nlawful' means criminal or tortious [conduct] or both and includes what would be criminal or tortious but for a----defense not amounting to justification or privilege."

38. Before the jury can determine, then, whether or not the plaintiff, Kevin Lee Stevens, was deprived of his liberty under the federal constitution without due process of law, it must first determine, from a preponderance of the evidence in the case, whether the defendants, George Corbell, (sic) Hal Wyatt, and Jessie Wilburn, were guilty of the acts or omissions severally alleged against them, and, if so, whether, under the circumstances shown by the evidence in the case, each defendant's conduct was within or without the bounds of his authority under state law. If a defendant, either Gerald Corbell, Hal Wyatt, or Jessie Wilburn, acted within the limits of his authority under state law, then such defendant could not have deprived the plaintiff of any liberty without due process of law; but if a defendant's acts or omissions were beyond the limits of his authority under the state law, then he may be found to have deprived plaintiff of his liberty without due process of law.

39. Article 15.24 of the Code of Criminal Procedure of the State of Texas provides: "No greater force...shall be resorted to than is necessary to secure the...detention of the accused."

40. You are instructed that the mere fact that the evidence in the case may establish physical contact between a defendant and the plaintiff which resulted in personal injuries and mental anguish is not proof that such defendant acted beyond his authority under the state law. To be unlawful, the force employed by the peace officer must be unreasonable. In making this determination as to whether the force used by the peace officer was reasonable or, on the other hand, unreasonable, all facts and circumstances shown by the evidence in the case must be considered by the jury.

41. If the peace officer's actions caused severe injuries, were grossly disproportionate to the need for action under the circumstances, and were inspired by malice rather than merely careless or unwise excess of zeal, so that they amounted to an abuse of official power that shocks the conscience, then the conduct of the peace officer may be found to be "unreasonable."

42. You are also instructed that "malice" in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of a person.

43. The plaintiff, Kevin Lee Stevens, contends that after he was arrested by Constable Johnny Williams on March 4, 1984, and taken to the Shelby County, Texas, Jail, excessive and unreasonable force was used by the defendant peace officer Gerald Corbell, in securing his detention in jail. Further, plaintiff contends that defendants Hal Wyatt and Jessie Wilburn stood by and acquiesced in defendant Gerald

Corbell's mistreatment of plaintiff, although they were fully aware of it at the time. Plaintiff also claims that he suffered permanent physical injuries and mental anguish, as a consequence of such detention.

44. The defendant peace officers, Gerald Corbell, Hal Wyatt, and Jessie Wilburn, allege that only reasonable force, under the circumstances, was used by defendant Corbell to secure plaintiff's detention. Further, they contend that defendant Gerald Corbell did not mistreat the plaintiff while securing his detention. Each defendant, therefore, denies that the plaintiff is entitled to recover any sum of money against him. Defendants Hal Wyatt and Jessie Wilburn also maintain that, if plaintiff Kevin Lee Stevens was abused by defendant Gerald Corbell, they were unaware of it at the time of its happening.

45. You are instructed that it is unquestioned that the defendants acted under color of state law at the time and on the occasion in question.

46. You are instructed that, upon the arrest of a person for an offense, a peace officer acquires direct responsibility for the arrested person's care and safety, and that a peace officer is not authorized to abuse or mistreat such an arrested person. On the contrary, any peace officer who has arrested another is required to treat the arrested person, who is under his control and at his mercy, with reasonable consideration; and a peace officer may not unlawfully misuse the person in such custody, by any conduct which is clearly unnecessary to maintain it and which unnecessarily and unreasonably causes bodily harm to the arrested person. Thus, if an arrested person offers resistance while in custody, a peace officer may exert only such physical force to overcome the resistance as would appear to be necessary to a reasonable person in like

circumstances. The use of excessive and unreasonable force by a peace officer in such an instance is unlawful. Moreover, the circumstances justifying plaintiff's arrest are irrelevant to the question of whether defendant Corbell used excessive force against plaintiff on the occasions in question.

47. Under Texas law, a peace officer may not, in response to only verbal provocation, use force to punish a person in his custody. Moreover, should a peace officer, before any resistence is offered, use greater force than necessary to secure the detention of a person, the detained person may use that degree of force against the peace officer that is immediately necessary to protect himself.

48. Now, if you should find that the plaintiff has proved, by a preponderance of the evidence, that the defendant Gerald Corbell used unreasonable force in securing his detention and that the force actually used did bodily harm to him, then the jury must find that such defendant acted unlawfully, that is, contrary to the laws of the State of Texas, and, further, that such defendant, did, without due process of law, deprive plaintiff of the liberty secured and protected to him by the Constitution and laws of the United States; and you will return a verdict for plaintiff, Kevin Lee Stevens, and against defendant, Gerald Corbell, in relation to plaintiff's claim that such defendant used unreasonable force in securing his detention.

49. On the other hand, if you find that the plaintiff has failed to prove, by the preponderance of the evidence, that the defendant peace officer, Gerald Corbell, in securing the detention of plaintiff, Kevin Lee Stevens, used unreasonable force on him, then such defendant is not liable to the plaintiff for such conduct, and it will be your duty to find for such

defendant, Gerald Corbell, and against the plaintiff, Kevin Lee Stevens.

50. All peace officers have an affirmative duty to prevent the unlawful abuse of a person which occurs in their presence. Peace officers are given the badge of authority, and they may not ignore the duty imposed by their office by failing to stop another officer who uses unreasonable force against a third person in their presence, or otherwise within their knowledge. That responsibility exists whether the onlooking officers are the supervisors of the officer who is unlawfully abusing a person, or are being supervised by that officer. It is no excuse that the onlooking officers did not believe that unreasonable force was being employed, if a reasonable person on the scene would have believed that it was being used. If unreasonable force was being employed, then the onlooking peace officers have a duty to intervene and prevent it.

51. Thus, if you find that plaintiff has proved, by a preponderance of the evidence, that defendant Gerald Corbell used unreasonable force on plaintiff, Kevin Lee Stevens, at the time in question, and that defendants Hal Wyatt and Jessie Wilburn were then aware of it, either because such abuse occurred in their presence or because they had knowledge of it, and, further, that they did nothing to prevent the abuse, then you must find them liable for acquiescing in the unreasonable force by failing to stop it. Even if defendants Hal Wyatt and Jessie Wilburn did not believe that defendant Gerald Corbell was using unreasonable force, their conduct is not excused, if a reasonable onlooker would have believed that defendant Gerald Corbell was employing unreasonable force at the time in question.

52. If, on the other hand, you find that plaintiff Kevin Lee Stevens has failed to prove, by a preponderance of the evidence that defendant Gerald Corbell used unreasonable force against plaintiff Kevin Lee Stevens, or that defendants Hal Wyatt and Jessie Wilburn were not aware that unreasonable force was being used against plaintiff, either because it was not in their presence or because they had no knowledge of it, then you must find that they are not liable.

53. Notwithstanding any of the foregoing instructions, you are instructed that, if a peace officer proves, by a preponderance of the evidence that, through some extraordinary circumstances, he either did not know, or reasonably should not have known, what the Constitution and law provides, he may not be held liable for damages.

54. In this connection, you are instructed that a peace officer's stated belief concerning his lack of knowledge regarding the legality of his actions does not settle the matter finally, but it must be supported by other evidence. The law does not exempt a peace officer from damages, if he merely acts in personal ignorance of the law or pretended ignorance of the law. While it is not required that peace officers have the sophisticated knowledge of law possessed by constitutional or criminal lawyers, nevertheless, because they are charged with the responsibility of enforcing the law, that same law holds that it is not unreasonable to expect them to have a reasonable knowledge of the Constitution's and law's content and workings in the fields of their responsibility.

55. In order to establish personal immunity from damages, then, the burden of proof is upon the individual officer to prove, by a preponderance of the evidence, that, at the time any of his actions or

omissions may have violated a person's constitutional rights, there was some extraordinary reason why he did not know what the law and Constitution provided. An officer is not allowed to act in violation of settled law or to transgress the clearly established constitutional rights of a person. Thus, in the case before you, if you find that the plaintiff has proved, by a preponderance of the evidence, that a particular defendant has infringed his clearly established constitutional rights or has violated rights to which he is entitled by settled law, you must find in favor of the plaintiff and against such defendant, unless such officer has shown, by the preponderance of the evidence, that, through some extraordinary circumstance, such individual defendant either did not know, or reasonably should not have known, what the Constitution and law provides.

56. If you find that plaintiff has been deprived of a constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for physical injury or injury to one's property. In one sense, no monetary value we place on constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

57. The precise value you place upon any constitutional right which you may find was denied to plaintiff Kevin Lee Stevens is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, and the significance which this particular issue had for the plaintiff.

58. If you should find that the plaintiff, Kevin Lee Stevens, is entitled to a verdict, in arriving at the amount of the award, you should also include:

(1) the reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff since the alleged physical injury to him, because of being unable to pursue his occupation, as a proximate result of the injury. In determining this amount, you should consider any evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled; and

(2) also such sum as will reasonably compensate the plaintiff for any loss of future earning power, proximately caused by the alleged physical injury in question, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future. In determining this amount, you should consider what plaintiff's health, physical ability, and earning power were before the accident and what they are now; the nature and extent of his injuries; whether or not they are reasonably certain to be permanent; or it not permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of his alleged physical injury upon his future earning capacity, and, second, the present value of any loss of future earning power, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future, as a proximate result of the injury in question.

59. If you should find that plaintiff is entitled to a verdict, you will also award him a sum which will compensate him reasonably: (1) for any pain, suffering

and mental anguish already suffered by him and proximately resulting from the alleged physical injury in question; and (2) for any pain, suffering and mental anguish, which you find from the evidence in the case that he is reasonably certain to suffer in the future from the same cause.

60. Further, if you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award, you should include the reasonable value, not exceeding the cost to plaintiff, of any examinations, attention, and care by physicians and surgeons and others shown by the evidence in the case to have been reasonably required and actually given in the treatment of the plaintiff, Kevin Lee Stevens.

61. In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

62. If the jury should find from a preponderance of the evidence in the case, that the plaintiff Kevin Lee Stevens is entitled to a verdict for actual or compensatory damages from defendant Gerald Corbell, and should further find that the acts or omissions of such defendant which proximately caused actual injury or damage to the plaintiff were wantonly or oppressively done, then the jury may, if in the exercise of discretion they choose to do so, add to the award of actual damages such amount as the jury shall agree to be proper, as punitive and exemplary damages.

63. An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indif-

ference to, the rights of one or more persons, including the injured person.

64. An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

65. Whether or not to make an award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should find, from a preponderance of the evidence in the case, that defendant Gerald Corbell's acts or omissions which proximately caused actual damage to the plaintiff were wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damage may be allowed only if the jury should first award the plaintiff a verdict for actual or compensatory damages against such defendant; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

66. You are instructed that in determining the amount of damages to be awarded the plaintiff against defendant Gerald Corbell, either actual or exemplary, you may take into consideration the manner and conduct of plaintiff Kevin Lee Stevens toward such

defendant at the times, respectively, of the three incidents in issue; and if you find that such defendant has proved, by a preponderance of the evidence, that the manner and conduct of the plaintiff were such as amounted to a provocation on his part in bringing about the separate incidents, then his damages, actual or exemplary, or both, should be reduced to such sum as, in your opinion, might seem proper.

67. On the other hand, if you find that plaintiff has proved, by a preponderance of the evidence, that defendant Gerald Corbell provoked one or more of the difficulties, intending then to injure plaintiff Kevin Lee Stevens when the latter responded to the provocation, then such damages, actual or exemplary, should not be reduced.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges--judges of the facts. Your

sole interest is to seek the truth from the evidence in the case.

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff, from a preponderance of the evidence in the case and in accordance with the other instructions.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will speak for you here in court.

Form interrogatories have been prepared for your convenience in reaching a verdict. I will read these to you at this time.

[Read jury interrogatories.]

It will be necessary for you to consider each interrogatory in the order I have set forth here.

You will take these forms to the jury room, and when you have reached unanimous agreement as to them, you will have your foreperson fill in the appropriate answers. When your deliberations have been completed, your foreperson will date and sign the forms, and you will then return your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the Deputy United States Marshal who will have you in charge, signed by your foreperson or by one or more members of the jury. No member of the jury should

ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

Bear in mind also that you are never to reveal to any person how the jury stands, numerically or otherwise, on the questions before you, until after you have reached an unanimous verdict.

(3)

No. 87-1741

In The

Supreme Court of the United States

October Term, 1987

GERALD CORBELL, ET AL.,

Petitioners,

v.

KEVIN LEE STEVENS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether interlocutory appellate review of a new trial order in an excessive force case is properly limited to purely legal issues under the collateral order doctrine given that the appeal is only permissible because the police officers claim qualified immunity and given that the use of excessive force violates clearly established law?

LIST OF PARTIES

1. Gerald Corbell, Petitioner
2. Hal Wyatt, Petitioner
3. Jesse Wilburn, Petitioner
4. Kevin Lee Stevens, Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent Kevin Lee Stevens respectfully submits this brief in opposition to the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case.

OPINIONS BELOW

Petitioners accurately state the status of the opinions below in their petition for writ of certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and is not disputed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. § 1983

> Every person who, under color of any state, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. 28 U.S.C. § 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

4. 28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

5. 28 U.S.C. § 1292 provides in relevant part that:

Interlocutory decisions

(a) except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dis-

solving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

6. Section 39.02, Texas Penal Code, which provides, in pertinent part, as follows:

(a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment . . . that he knows is unlawful; or

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, . . . or immunity, knowing his conduct is unlawful.

(b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

STATEMENT OF THE CASE

Respondent Stevens filed suit under 42 U.S.C. § 1983 against Petitioner Corbell for using excessive force and against Petitioners Wilburn and Wyatt for failing to protect Respondent Stevens from Petitioner Corbell. The

district court in relevant part instructed the jury as follows:

> 36. Section 39.02 of the Texas Penal Code sets out the circumstances under which state officials transgress their authority under state law. The court finds this statute to comport with the Constitution of the United States. It provides, in part, as follows:
>
> > (a) A public servant acting under color of his office or employment commits an offense if he:
> >
> > > (1) intentionally subjects another to mistreatment . . . that he knows is unlawful; or
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> > > (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, . . . or immunity, knowing his conduct is unlawful.
> > >
> > > (b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(App. E., 37a-38a).[1]

The erroneously charged jury returned a verdict for the petitioners. Respondent Stevens timely filed a motion for new trial which was based in part on the fact that the challenged jury instruction in substance permitted petitioners to intentionally subject Respondent Stevens to mistreatment unless petitioners knew that their conduct was unlawful and permitted petitioners to intentionally deny Respondent Stevens his constitutional rights unless petitioners knew their conduct was unlawful. The district court granted a new trial on the basis of the erroneous

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1 References are to the appendix filed by petitioners.

instruction without reaching the merits of the remaining grounds asserted by respondent. (App. C., 18a-26a).

Petitioners next submitted a motion to vacate the order granting a new trial or, alternatively, to appeal pursuant to 28 U.S.C. § 1292(b) and for a stay of district court proceedings pending the appeal which was denied. Petitioners next filed with the district court a notice of appeal to the Fifth Circuit Court of Appeals, and filed in the Fifth Circuit an emergency motion for stay of the district court proceedings pending an appeal. The stay was granted, *Stevens v. Corbell,* 798 F.2d 120 (5th Cir. 1986) (App. B., 16a-17a). The new trial order was subsequently affirmed, *Stevens v. Corbell,* 832 F.2d 884 (5th Cir. 1987) (App. A., 1a-15a). The court rejected petitioners' qualified immunity defense because the use of excessive force violates well-settled law. *Stevens v. Corbell,* 832 F.2d 884, 890 (5th Cir. 1987) (App. A., 13a).

SUMMARY OF ARGUMENT

1. Qualified immunity does not protect governmental officials who violate the clearly established constitutional rights of a victim. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Further, the scope of review of an interlocutory appeal raising the qualified immunity defense is limited to purely legal issues. *Mitchell v. Forsyth,* 472 U.S. 511 (1985).

2. The opinion in the case at bar is not in conflict with any decision of this Court, any appellate court, or any state court of last resort.

3. The erroneous jury instruction which provides the basis for a new trial does not have anything to do with qualified immunity.

———o———

REASONS FOR DENYING THE WRIT

This Case Presents No Important Unsettled Questions

A. This Court in Harlow Defined the Scope of Qualified Immunity Available to Governmental Officials

This Court has explicitly held that qualified immunity only shields governmental officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity defense is not available when the law is clearly established at the time of the alleged violation. *Harlow, Id* 818-819. In fact, the court below explicitly rejected petitioners' qualified immunity defense precisely because there is no real dispute about what the law authorizes with regard to the knowing use of excessive force. *Stevens v. Corbell*, 832 F.2d 884, 890 (1987) (App. A., 13a). As the United States Court of Appeals succinctly stated in this case:

> The law is and was clear in allowing a police officer to use only the amount of force he honestly believes is needed. Since it is well-settled in this Circuit that knowing use of excessive force in booking an arrestee violates the arrestee's constitutional rights, the defense of qualified immunity is unavailable to a police

> officer who the plaintiff has alleged thus used excess force.

Stevens, Id, 890 (App. A., 13a).

B. This Court in Mitchell Defined the Narrow Scope of Review Available on Interlocutory Appeals Based on Qualified Immunity

It is now well established that an order granting a new trial is not appealable. *Allied Chemical Corp. v. Diaflon, Inc.,* 449 U.S. 33, 34 (1980). However, in *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985), this Court held that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291. This Court noted that the claim of immunity is conceptually distinct from the merits of plaintiff's claim that his rights have been violated, *Id* 527-528 and succinctly set out the narrow scope of the interlocutory review:

> We emphasize at this point that the appealable issue is purely a legal one: whether the facts alleged (by the plaintiff, or in some cases, the defendant) support a claim of violation of clearly established law.

Mitchell, Id, at 528 n. 9.

The court below faithfully followed this Court's clear instructions and properly limited its review to legal error only. *Stevens v. Corbell,* 832 F.2d 884, 890-91 (1987) (App. A., 14a-15a).

There is no Conflict Among the Circuits or State Courts of Last Resort

The Fifth Circuit's opinion in *Stevens v. Corbell, supra,* does not conflict with any decision of this Court. Petitioners have failed to cite a single circuit or state court of last resort case that is in conflict with the Fifth Circuit's opinion in the case at bar because none exist.

Petitioners Misstate the Issue and this Court is not Likely to Reach the Question Presented if Certiorari is Improvidently Granted

The "Question Presented" by petitioners is not crystal clear. However, the case at bar is not an appropriate vehicle for further refining the scope of qualified immunity or the scope of appellate review following an interlocutory appeal.

Qualified immunity in this case is little more than a red herring asserted by petitioners in order to obtain an interlocutory appeal, thereby delaying Respondent Stevens' trial before a properly charged jury. As noted by the court below:

> We think, however, that the district court's basis for granting the new trial goes more to the substantive elements a plaintiff must prove in his § 1983 claim than to the issue of qualified immunity. None of the interrogatories submitted to the jury dealt with qualified immunity. Although one part of the Court's jury charge did describe the qualified immunity defense, that instruction is not the one upon the basis of which a new trial was granted.

Stevens v. Corbell, supra, 834 F.2d at 887 (5th Cir. 1987) (App. A., 6a). In fact, jury instruction number 36 (App.

D., 37a-38a) which provided the basis for granting a new trial has nothing to do with qualified immunity.

It is also grossly inaccurate to imply in petitioners' question presented that petitioners have been vindicated in a trial without reversible error. (See Petition for Writ of Certiorari, Question Presented, p. i). The trial court specifically held that the erroneous instruction required a new trial and did not reach the remaining grounds asserted by respondent (App. C., 26a n. 5) and the appellate court (App. A., 1a-15a) has not had occasion to review the record to determine whether the challenged jury instruction which triggered the new trial or other grounds for new trial asserted by respondent and not reached by the trial court constitute reversible error.

It is clear that the challenged jury instruction which provided the basis for the new trial, standing alone, was extremely harmful to respondent because it improperly placed the heavy burden on respondent, as a prerequisite to recovery, to prove both that petitioners' wrongful acts were intentional and that petitioners' intentional wrongful acts were committed with knowledge that the intentional wrongful acts violated the law. The court of appeals found the instruction to be legally incorrect and petitioners apparently agree.

The question of the proper scope of appellate review in qualified immunity cases, in addition to already being decided by this Court in *Mitchell, supra,* is not properly before the Court in this case because the qualified immunity defense does not protect police officers who use excessive force in violation of well-settled law. Therefore,

it is very doubtful that this Court would even reach petitioners' question presented in the event that certiorari were granted.

Simply put, petitioners, presumably knowing that new trial orders are not ordinarily appealable, belatedly raised qualified immunity as an issue in a transparent effort to get the appellate court and this Court to grant plenary review over the district court's decision granting a new trial. This, of course, would go far beyond the appropriate scope of review under the collateral order doctrine as articulated in *Mitchell, supra.* Finally, it is interesting to note that petitioners still do not challenge the qualified immunity instruction actually given by the court below which will presumably be given on retrial and petitioners did not object to the qualified immunity instruction when the jury was charged or in response to respondent's motion for a new trial.

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CONCLUSION

Respondent respectfully prays that the petition for certiorari be denied for the reasons set out above.

Respectfully submitted,

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